

1 HONORABLE RONALD B. LEIGHTON  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 STELLAR J CORPORATION, a Texas  
11 corporation,

12 Plaintiff,

13 v.  
14 ARGONAUT INSURANCE COMPANY,  
15 an Illinois corporation,

16 Defendant.

17 and

18 UNISON SOLUTIONS, INC., an Iowa  
19 corporation,

20 Defendant and Third-Party Plaintiff,

21 v.  
22 TRAVELERS CASUALTY AND  
23 SURETY COMPANY OF AMERICA;  
24 XCHANGER, INC., a Minnesota  
corporation; and RHODE BROTHERS,  
INC., a Wisconsin corporation,  
25  
26 Third-Party Defendants.

CASE NO. 3:12-cv-05982 RBL  
ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS

1        THIS MATTER is before the Court on Defendant Unison Solutions' Motion to Dismiss  
 2 Stellar J's fraud claim. Stellar J's Second Amended Complaint alleges that Unison concealed the  
 3 defective nature of its "SulfrStrip" sulfur removal technology which was installed at the Klickitat  
 4 Public Utility District No. 1 (KPUD) jobsite. Stellar J claims that it relied on Unison's expertise  
 5 in sulfur removal technology to its detriment, as it had to spend millions of dollars replacing the  
 6 SulfrStrip. Unison moves to dismiss the fraud claim pursuant to Rules 9(b) and 12(b)(6) arguing  
 7 that Stellar J has failed to plead facts with requisite particularity.

8                      **I.        Background**

9        In 2008, KPUD hired Applied Filter Technology (AFT) to construct landfill gas cleaning  
 10 and compression equipment at the H.W. Hill Landfill. The objective was to draw methane from  
 11 the landfill, compress the gas, filter out impurities, and convert it to useable energy. AFT  
 12 assigned the agreement to Stellar J, when it could not obtain the required bonding. Unison was  
 13 the subcontractor responsible for the bulk of the work involving the cleaning and compression  
 14 equipment. As part of the package, Unison and AFT cooperatively designed and manufactured  
 15 the SulfrStrip system<sup>1</sup> which was supposed to use a chemical process to remove sulfur  
 16 particulates from the landfill gases. The SulfrStrip did not operate properly, and Stellar J  
 17 temporarily replaced it with a media-based (as opposed to a chemical-based) sulfur removal  
 18 system in order to keep the project on schedule. Stellar J claims it spent at least \$2.6 million  
 19 replacing the faulty system.

20       During discovery, Stellar J learned that Unison and AFT had previously designed and  
 21 manufactured another SulfrStrip system for the "City Brewery" project in LaCrosse, WI. The  
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24       <sup>1</sup> The extent of Unison's role in designing and manufacturing the SulfrStrip is still in dispute.

1 SulfrStrip system did not work on that project, either, and it too had to be replaced with a media-  
 2 based sulfur removal system.

3 Stellar J's Second Amended Complaint alleges that Unison was aware that SulfrStrip was  
 4 unreliable and knew that it would impose additional costs on Stellar J. Stellar J further claims  
 5 that Unison affirmatively represented its SulfrStrip system would perform the required functions,  
 6 or alternatively, that Unison failed to disclose SulfrStrip's defects where it had a duty to do so.  
 7 Stellar J claims that it relied on Unison's representations or omissions, leading to \$2,644,307.21  
 8 in damages when SulfrStrip had to be replaced.

9 Unison seeks dismissal of this claim because it fails to state with particularity the specific  
 10 circumstances of the alleged fraud as required by Rule 9(b). Stellar J responds by asserting that  
 11 Unison engaged in fraudulent "concealment" rather than commission, so only Unison could  
 12 possess the knowledge of the circumstances constituting fraud. In its response to the Motion to  
 13 Dismiss, Stellar J points to a number of emails between Unison personnel revealing concerns  
 14 about the functionality of the SulfrStrip system, and its failures at City Brewery. These were not  
 15 referenced in the Complaint. Stellar J requests leave to amend its Complaint if the Court finds  
 16 that it has failed to plead sufficient facts with particularity.

17 **II. Discussion**

18 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
 19 theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*  
*Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege  
 21 facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937,  
 22 1949 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual  
 23 content that allows the court to draw the reasonable inference that the defendant is liable for the  
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1 misconduct alleged.” *Id.* Although the Court must accept as true the Complaint’s well-pled  
 2 facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise  
 3 proper [Rule 12(b)(6)] motion. *Vasquez v. L. A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007);  
 4 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation  
 5 to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,  
 6 and a formulaic recitation of the elements of a cause of action will not do. Factual allegations  
 7 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,  
 8 550 U.S. 544, 555 (2007) (citations and footnote omitted). This requires a plaintiff to plead  
 9 “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S.Ct. at  
 10 1949 (citing *Twombly*).

11         Additionally, a party alleging fraud must “state with particularity the circumstances  
 12 constituting fraud,” but “[m]alice, intent, knowledge, and other conditions of a person’s mind  
 13 may be alleged generally.” Fed.R.Civ.P. 9(b). To comply with Rule 9(b), allegations of fraud  
 14 must state “the who, what, when, where, and how” of the misconduct charged. *Cafasso v.*  
 15 *General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). This heightened pleading  
 16 standard ensures that defendants have adequate notice of the alleged misconduct so that they can  
 17 defend against the charge and are not left to simply deny that they have done anything wrong.  
 18 *Kerns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2008). “A pleading is sufficient under  
 19 Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an  
 20 adequate answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671-72 (9th Cir.  
 21 1993) (*citing Gottreich v. San Francisco Inv. Corp.*, 552 F.2d 866, 866 (9th Cir. 1977)) (internal  
 22 quotations omitted).

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1 On a 12(b)(6) motion, “a district court should grant leave to amend even if no request to  
2 amend the pleading was made, unless it determines that the pleading could not possibly be cured  
3 by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242,  
4 247 (9th Cir. 1990). However, where the facts are not in dispute, and the sole issue is whether  
5 there is liability as a matter of substantive law, the court may deny leave to amend. *Albrecht v.*  
6 *Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

7 Though Stellar J’s amended Complaint fails to specify the “who, what, when, where, and  
8 how” of the alleged fraud, it has the material to easily remedy the deficiencies. A potentially  
9 viable claim should not be dismissed entirely for failing to meet the pleading requirements of  
10 Rule 9(b), when an amended pleading could easily remedy the Defendant’s objections without  
11 prejudice.

12 Unison’s Motion to Dismiss is **DENIED**. Stellar J should amend its Complaint to allege  
13 the specifics of its fraud claim within 21 days of this Order.

14 IT IS SO ORDERED

15 Dated this 23<sup>rd</sup> day of July, 2014.

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18 RONALD B. LEIGHTON  
19 UNITED STATES DISTRICT JUDGE  
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